SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 64

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITIONERS' BRIEF.

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PETITIONERS' BRIEF.

I.

Opinions Below.

The majority opinion (R. 120) of the Supreme Court of California is reported in 15 Cal. (2d) 99. The dissenting opinions (R. 139, 140) are reported in 15 Cal. (2d) 121, 122. The unreported opinion of the trial judge may be found (R. 95).

II.

Statement Disclosing Basis of Jurisdiction.

1. Jurisdiction is invoked under Sec. 237b of the Judicial Code, as amended by Act of February 13, 1925 (43 Stat. 937).

2. Judgment of the Supreme Court of California was entered January 31, 1940 (R. 148). Petition for Rehearing, timely filed, was denied February 29, 1940 (R. 149).

3. Upon argument on demurrer to a criminal contempt of court citation, petitioners asserted reliance upon the First and Fourteenth Amendments to the United States Constitution, guaranteeing freedom of speech and of the press (R. 4, 28). The trial court overruled the demurrer (R. 94) and ruled that petitioners were not protected by these guarantees (R. 98-106). The guarantees were asserted in the California Supreme Court (R. 61). The Supreme Court of California affirmed the convictions, holding that petitioners were not shielded by these guarantees (R. 134-137). There were two dissenting opinions (R. 139-140).

4. The following cases are believed to sustain jurisdiction:

Cantwell v. Connecticut, 310 U. S. 296;
Thornhill v. Alabama, 310 U. S. 88;
Carlson v. California, 310 U. S. 106;
Schneider v. New Jersey, 308 U. S. 147, and cases therein cited in Footnote 8;
Near v. Minnesota, 283 U. S. 697;
Toledo Newspaper Co. v. United States, 247 U. S. 402, 411.

III.

Statement of the Case.

The Times-Mirror Company and Hotchkiss are the publisher and managing editor, respectively, of the Los Angeles Times (hereinafter called "Times"), a newspaper of general circulation in the City of Los Angeles and State of California (R. 10).

On December 21, 1937, there was published in the Times an editorial entitled "SIT-STRIKERS CONVICTED" (R. 10-11); on April 14, 1938, an editorial entitled "THE FALL OF AN EX-QUEEN" (R. 17), and on May 5, 1938, an editorial entitled "PROBATION FOR GORILLAS?" (R. 23).

On June 3, 1938, summary [1] contempt of court proceedings were instituted against petitioners for the publication of said editorials (R. 25). The Times was adjudged guilty of criminal contempt for the publication of each of the editorials, and Hotchkiss as to "SIT-STRIKERS CONVICTED" (R. 60). Separate fines were imposed (with alternative jail sentence as to Hotchkiss) for each editorial (R. 60-61).

No evidence of interference with any court proceeding was offered, and no showing was made that the editorials created a "clear and present danger" of inter-

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[1] The proceedings were summary—the state Supreme Court declaring unconstitutional the California statute prohibiting summary punishment for constructive contempt (R. 121); cf. *Bridges v. Superior Court*, 14 Cal. (2d) 464, 479 et seq. Petitioners were not prosecuted for violation of *California Penal Code* Sec. 166, Subd. 8, which is relied on by respondent to sustain the judgment in respect to "PROBATION FOR GORILLAS?" (Br. Opp. Cert. 25).

ference (R. 66-88, 148). The trial judge expressly rejected the "clear and present danger" rule (R. 105-106). In affirming the convictions the California Supreme Court, which in *Bridges v. Superior Court,* 14 Cal. (2d) 464,[2] had also rejected this rule, concluded that "a reasonable tendency to interfere with the orderly administration of justice" (R. 122), constituting punishable contempt, appeared from the tenor of the editorials (R. 128, 130, 133).

Thereupon The Times-Mirror Company and L. D. Hotchkiss petitioned this court for a writ of certiorari (October Term 1939, No. 972), which was granted (R. 151, 310 U. S. ——).

"SIT-STRIKERS CONVICTED" (R. 11) was published the day following the rendition by a jury of a verdict of guilty against twenty-two defendants charged with a felony (R. 10). It spoke with approval of the courts, juries, and law enforcement officers of Los Angeles County following the prosecution and conviction of persons committing acts of violence in connection with a sit-down strike at a local airplane factory (R. 46). It stated in effect that the verdict was a warning that Union terrorism will not be tolerated in Los Angeles, particularly directing the warning to the Teamsters' Union, which was threatening to extend its political control to Los Angeles and vicinity (R. 48, 49). The attitude of the Times toward the open shop, and its inflexible opposition to the closed shop and the sit-down strike, were well known, and the editorial was but a reiteration of its fre-

[2] Certiorari granted No. 19, October Term 1940.

quently announced views on such matters (R. 43-48). At the time of publication, although the verdict of guilty had been returned by a jury, judgment had not yet been pronounced, nor sentence imposed (R. 10).

"THE FALL OF AN EX-QUEEN" (R. 17) was published two days following the rendition by a jury of a verdict of guilty as charged against two defendants indicted for felonies, namely, attempted grand theft and violating Sec. 653f of the Penal Code (soliciting a bribe) (R. 16-17). The editorial was an analytical discussion of the sordidness of "boss-ship" in politics. It attempted to point out a persuasive moral. It did "not refer to the case which was then pending" (R. 130), nor did it contain any suggestion respecting future court proceedings.

"PROBATION FOR GORILLAS?" (R. 23) was published about two weeks subsequent to the rendition of jury verdicts of guilty as charged against two defendants charged with a felony, namely, assault with a deadly weapon (R. 23). At the time of publication the convicted defendants had applied for probation and the trial judge had set a date (five weeks subsequent to the date of the publication of the editorial) for hearing the application and pronouncing judgment (R. 23). The editorial contained a statement of the Times' well-known views regarding the use of violence in labor disputes (R. 146-147). It vigorously opposed the granting of probation to the two men convicted of assaulting non-union truck drivers (R. 23). It stated that the trial judge (mentioned by name) "will make a serious mistake if he

grants probation," and that the "community needs the example of their assignment to the jute mill" (R. 24).

The editorials did not assail or comment unfavorably upon the courts or any judge thereof. There was no intimation of threat or dissatisfaction with proceedings had and taken or contemplated.

The editorial "SIT-STRIKERS CONVICTED" commented favorably upon court proceedings and law enforcement agencies, which proceedings resulted in the conviction of numerous defendants. There was no reference to any pending or contemplated action or proceeding.

The editorial "THE FALL OF AN EX-QUEEN" made no reference to any court proceeding. (The Supreme Court of California so admits, R. 130.) In mild and temperate language the editorial pointed a moral, viz., the normal and inevitable consequences of the law's violation, even though, as the editorial pointed out, the convicted defendant was actuated by ambition for power rather than a desire for money. It might well have emanated from the professor, the parent, or the pulpit.

The editorial "PROBATION FOR GORILLAS?" related directly to a pending application for probation by two defendants who stood convicted of a felony. Under the California law:

1. Probation could not be granted,[3] and

2. Probation proceedings do not involve questions of

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[3] *In re Sheffield*, 18 Cal. App. (2d) 177, 178.

law and the established rules for the conduct of trials are not applicable.[4]

There was no showing that any of the editorials came to the attention of any of the judges before whom the related matters were pending; that any trial judge felt that he was influenced or embarrassed because of any of them; that any of the defendants in the related cases suggested or complained that any prejudice resulted to them because of the editorials; nor was there any showing of an intent on the part of petitioners to influence or embarrass the proceedings in the related cases. Petitioners under oath denied the existence of any such intent (R. 31, 33, 35, 37, 39, 41).

IV.

Specification of Errors.

The Supreme Court of California erred:

1. In refusing to adopt the "clear and present danger" test as the criterion by which the propriety of the editorials should be measured.

2. In adopting the "reasonable tendency" test as the criterion by which the propriety of the editorials was measured.

3. In concluding that the editorials had a "reasonable tendency" to interfere with the orderly administration of justice.

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[4] *People v. Jones*, 87 Cal. App. 482;
People v. Freithofer, 103 Cal. App. 165;
People v. Fields, 131 Cal. App. 56;
People v. Blankenship, 16 Cal. App. (2d) 606.

V.

The Questions Presented.

1. Is the "clear and present danger" test, rather than the "reasonable tendency" test, applicable in proceedings to punish for constructive contempt by publication?

2. If not, did the editorials in question have a "reasonable tendency" to interfere with the orderly administration of justice?

VI.

ARGUMENT.

Summary of the Argument.

Point 1. The "clear and present danger" test, rather than the "reasonable tendency" test, should be applied to determine the propriety of language claimed to interfere with the judiciary as well as to utterances claimed to offend against conventional penal statutes. This test affords a definite and certain standard. It will guarantee the exercise of an "essential liberty" [5] without jeopardizing the independence of the judiciary.

Point 2. The erroneous conclusion of the state court that the editorials had a "reasonable tendency" to interfere with the orderly administration of justice has sacrificed a freedom that "is the matrix, the indispensable condition, of nearly every other form of freedom" [6] "for a need which is fancied rather than real." [7]

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[5] *Lovell v. Griffin*, 303 U. S. 444, 452.

[6] *Palko v. Connecticut*, 302 U. S. 319, 327.

[7] *Times-Mirror Co. v. Superior Court*, 15 Cal. (2d) 99, dissent of Mr. Justice Gibson (R. 140).

POINT 1.

The "clear and present danger" test, rather than the "reasonable tendency" test, should be applied to determine the propriety of language claimed to interfere with the judiciary as well as to utterances claimed to offend against conventional penal statutes. This test affords a definite and certain standard. It will guarantee the exercise of an "essential liberty" without jeopardizing the independence of the judiciary.

The "Clear and Present Danger" Doctrine Should Have Been Applied.

The California Supreme Court held that the editorials were contemptuous because they had "a reasonable tendency to interfere with the orderly administration of justice" in pending actions (R. 122), relying principally upon *Bridges v. Superior Court*, 14 Cal. (2d) 464,[8] *Toledo Newspaper Co. v. United States*, 247 U. S. 402, and *Patterson v. Colorado*, 205 U. S. 454. The court expressly rejected the "clear and present danger" test in the *Bridges decision* (14 Cal. (2d) 491) and accordingly rejected it in the instant proceeding. The trial court categorically refused to apply such test (R. 105-106).

Censorship (direct or devious) of freedom of speech or of the press cannot be imposed by legislative,[9] executive,[10] or judicial[11] arms of the government—federal or

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[8] Certiorari granted No. 19, October Term, 1940.
[9] *Schneider v. New Jersey*, 308 U. S. 147.
[10] *Lovell v. Griffin*, 303 U. S. 444.
[11] *Cantwell v. Connecticut*, 310 U. S. 296.

state. Recent decisions make clear that an utterance may not be punished as a crime

> " * * * unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent * * * ." [12]

This doctrine ("clear and present danger") was first adopted by a majority of this court in *Herndon v. Lowry*, 301 U. S. 242, 256. During the October Term, 1939, this court applied the test on three occasions [13] and in effect invoked it on a fourth.[14] Perhaps its fullest exposition appears in Mr. Justice Brandeis' concurring opinion in the *Whitney case*. It is there declared that to support a finding of a "clear and present danger" it must be shown:

> 1. That immediate serious violence was expected or advocated or that the past conduct of the speaker furnished reason to believe that such advocacy was then contemplated (274 U. S. 376);
>
> 2. That no danger flowing from speech shall be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may occur before there is a chance for full discussion (274 U. S. 377);
>
> 3. That speech cannot be prohibited in order to avert a relatively trivial harm to society (274 U. S. 377);

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[12] Justices Brandeis and Holmes concurring in *Whitney v. California*, 274 U. S. 357, 373.

[13] *Thornhill v. Alabama*, 310 U. S. 88;
Carlson v. California, 310 U. S. 106;
Cantwell v. Connecticut, 310 U. S. 296.

[14] *Schneider v. New Jersey, supra.*

4. The fact that speech is likely to result in violence is not enough to justify its suppression; there must be a probability of serious injury to the state (274 U. S. 378).

If this criterion is applied to alleged constructive contempts by publication, it would seem necessary that it be shown:

1. That an immediate and serious interference with the administration of justice was expected or advocated; or

2. That the past conduct of the publisher furnished reason to believe that such advocacy was then contemplated; and

3. That the event of the interference is so imminent that it may occur before there is a chance for full discussion.

A fanciful disturbance of judicial calm or a speculative prejudice to litigants as a result of the utterances will not suffice. There is a greater social interest in the preservation of freedom of speech and of the press than there is in the elimination of hypothetical evils.

Application of the "Clear and Present Danger" Doctrine Discloses That the Publications Constituted a Proper Exercise of the Constitutional Guarantee of Freedom of the Press.

Judged by the "clear and present danger" standard, the contempt convictions cannot be supported. No proof was adduced that any judge had read the editorials or even heard of them. No judge testified that he had been embarrassed or made to feel apprehensive that, if he extended leniency to any of the convicted defendants, he would meet with reprisal, criticism or condemnation. There was no showing that any of the defendants contended they were or might be prejudiced as a result of the editorials, nor did it appear that the past conduct of petitioners furnished reason to believe that if the courts decided contrary to the assumed views of the Times, denunciation or criticism of the judges would appear in the columns of the paper. The juries that convicted the defendants had been dismissed. With the exception of "PROBATION FOR GORILLAS?", there was no "suggestion" as to what should be done with any of the defendants. "PROBATION FOR GORILLAS?" was published five weeks prior to the time set for hearing the application for probation (R. 23). Is the evil which the California court assumed would arise from this so imminent that punishment may constitutionally be imposed? No judge or court was exposed to ridicule or obloquy. We feel with Mr. Justice Gibson that "no disturbance of judicial calm occurred until after the accusations were filed" (R. 148).

The record is void of any evidence of an obvious or imminent serious danger of interference with the functioning of the courts as a consequence of these utterances. The assumed dangers were by no means as proximate as those involved in the *Cantwell case*. Cantwell's phonograph record, expounding strictures against the Roman Catholic Church (in a neighborhood composed of ninety per cent Roman Catholic residents (310 U. S. 301)), was highly offensive to the persons Cantwell had approached, one testifying that he felt like hitting Cantwell; the other that he was tempted to throw him off the street (310 U. S. 309).

There is greater need, from the standpoint of protection of freedom of speech, that the "clear and present danger" standard be applied in proceedings to punish for constructive contempt by publication than in conventional criminal proceedings seeking to punish utterances claimed to offend against espionage laws, syndicalism acts or legislation of similar purport. In the latter classes of cases the accused has the benefit of a jury. But in California, in constructive contempt proceedings, no jury is tolerated. The courts have declared unconstitutional the legislative intention that such contempts shall not be punished summarily.[15] A majority of state courts yet mistakenly adhere to the doctrine that the legislature may not defeat the "inherent" right of the courts to proceed summarily in constructive contempt proceedings.[16] The judge before

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[15] *Bridges v. Superior Court*, 14 Cal. (2d) 464, 478, 479-484.

[16] 37 *Harvard Law Review*, 1010; 28 *Columbia Law Review*, 401-431, 525-553.

whom an alleged contemner is hailed is the sole arbiter of his fate. Frequently the very judge or court allegedly contemned passes upon the guilt of the speaker or editor.[17]

Former Decisions of This Court Dealing With Constructive Contempt by Publication Were Rendered Prior to Adoption of the "Clear and Present Danger" Doctrine.

Counsel for respondent assert (Br. Opp. Cert. 40) that the "clear and present danger" test was not intended to apply to constructive contempt proceedings, basing their contention upon the fact that to date this court has not applied the doctrine to such causes. Reliance is placed upon *Toledo Newspaper Co. v. United States,* 247 U. S. 402, *Sinclair v. United States,* 279 U. S. 749, and *Associated Press Co. v. National Labor Relations Board,* 301 U. S. 103. Of these decisions the *Toledo case* alone deals with constructive contempt by publication. It was decided prior to the adoption of the "clear and present danger" doctrine. The constant and repeated intemperate attacks upon the court and the railroad company (which came to the personal attention of the district judge (220 Fed. 461)), the urging of the public to disregard the court's injunction, the inflamed local feeling and the exhortations to indulge in force, constitute a fundamentally different and readily distinguishable factual situation than exists in the Times case.

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[17] *Trial of James Peck,* by Benjamin Stansbury;
People v. News-Times Publishing Co., 35 Colo. 253 (*Patterson case*);
In re San Francisco Chronicle, 1 Cal. (2d) 630;
United States v. Toledo Newspaper Co., 220 Fed. 458 (*Toledo case*).

The *Sinclair decision* involved jury-shadowing. It was not a free-speech case. The Constitution does not guarantee the right to shadow juries. It does guarantee the right of free speech. The states have broad discretion in the regulation of overt acts, but not so in attempts to restrict the exercise of freedom of speech.[18]

The cursory statement in the *Associated Press case* that newspapers are subject to punishment for contempt of court, is not helpful in solving the problem here presented.

The Doctrine Has Not Been Restricted in Its Application to Utterances Creating An Imminent Danger of Overthrow of Organized Government.

The "clear and present danger" doctrine has not been restricted in application to utterances creating imminent danger of overthrow of organized government, as stated by respondent (Br. Opp. Cert. 42). During the October Term, 1939, it was applied by this court in the *Thornhill* and *Carlson cases* to picketing activities, and in the *Cantwell case* to the activities of members of Jehovah's Witnesses. Counsel for respondent (Br. Opp. Cert. 42) quote an excerpt from the opinion of the trial court in which it is asserted that application of the "clear and present danger" criterion would "mean that one contempt, or possibly two or more, would of necessity be passed by as unimportant, that the court could act only

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[18] cf. Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 377-378;
Schneider v. New Jersey, 308 U. S. 147, 161.

after so many contempts had been committed that the courts and the government would have been undermined * * * " (R. 106). This excerpt clearly indicates the failure of the trial court and counsel for respondent to appreciate the true effect of the "clear and present danger" doctrine. The test, if applied to contempt proceedings, would not justify interference with one judge or one judicial proceeding. It does not mean "that the court could act only after * * * the courts and the government would have been undermined." All that need appear is that an immediate and serious interference with a court proceeding was advocated or was to be expected.

... Tendency" Standard May Have Been the Ancient Criterion Governing Constructive Contempt by Publication, This Does Not Justify Its Application Under the Terms of the Federal Constitution.

Respondent's counsel attempt to justify the "reasonable tendency" criterion on the ground that it "is the ancient common law standard applicable to contempt of court" (Br. Opp. Cert. 51). This begs the question whether the standard is sufficiently definite to enable a person to differentiate between right and wrong. The "tendency to provoke disorder," which was held to be a crime by the Connecticut courts in the *Cantwell case*, was "a common law concept" (310 U. S. 296, 308); this recourse to antiquity did not sustain Cantwell's conviction.

Prevention of Assumed Disturbances of Judicial Calm Does Not Justify Suppression of Expression.

In the final analysis respondent's contention is that *if* the editorials had been seen by the judges, they *might* have been *embarrassed, disturbed* or *unconsciously influenced* by them (Br. Opp. Cert. 52). Under respondent's conception of the problem these effects are undesirable and therefore the publications are a contempt. The answer to this contention is complete, viz., a court "may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." [19]

Protection of the Courts Is Not More Important Than Protection of Organized Government.

Protection of the courts from interference, we believe, is not more important than protection of the state from destruction. The courts are but an arm of the state. This arm may not restrain or punish speech unless it constitutes a "clear and present danger" of serious interference. To hold otherwise is to say that preservation of the limb is more essential than preservation of the trunk—that a part is greater than the whole.

The Supreme Courts of South Dakota [20] and Indiana [21] have refused to apply the "reasonable tendency" test in proceedings for constructive contempt by publication.

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[19] *Cantwell v. Connecticut*, 310 U. S. 296, 308.
[20] *State v. American-News Co.*, 64 S. D. 385.
[21] *Nixon v. State*, 207 Ind. 426.

These recent and enlightened decisions give proper recognition to the importance of maintaining the right of free speech and a free press.

The Vagueness of the "Reasonable Tendency" Test Is Condemned In the Cantwell Decision.

The "reasonable tendency" test applied by the California court is analogous in its vagueness and uncertainty to the common law offense of inciting a breach of the peace condemned by this court in the *Cantwell case*. There the indictment charged that the phonograph record played by Cantwell had disturbed public tranquility by "tending to provoke or excite others * * * to break the peace" (126 Conn. 1, 2). In reversing Cantwell's conviction this court declared:

> " * * * the judgment is based on a common law concept of the most general and undefined nature.
>
> * * *
>
> "Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."
>
> 310 U. S. 296, 308.

Freedom of speech (when claimed to conflict with the judiciary) will exist in theory but not in practice if its exercise must be made at the risk of some judge concluding from a subjective consideration of the statement that the utterance had a "reasonable tendency" to interfere with the orderly administration of justice. This nebulous standard—"reasonable tendency"—amounts in

application to judicial censorship of comment upon court proceedings. So serious may be the consequences resulting from a public utterance concerning judicial proceedings, so indefinite the zone where a permissible "point of finality" of the proceeding is reached, and so uncertain will be the average citizen whether his utterance may have a "reasonable tendency" to interfere with the orderly administration of justice, that, impelled by the apprehension of criminal prosecution, he will remain silent despite his constitutional right of freedom of discussion. Thus will "oblique methods" [22] of censorship be established.

Uncertainty of the "Reasonable Tendency" Test Is Here Demonstrated.

That uncertainty exists in judicial circles concerning the scope of the "reasonable tendency" test is established by the history of this proceeding. The Contempt Committee of the Bar Association charged petitioners with seven contempts arising out of seven published editorials (R. 109; 111-114; 116-117). The trial court held that two of the editorials were not (R. 112, 114), but that five were contemptuous (R. 111, 113, 116-117). Of these five, a majority of the California Supreme Court held that but three of the editorials were contemptuous (R. 139). Two justices dissenting held that no one of the five was contemptuous (R. 140, 148).

With such divergence and conflict of opinion among jurists and judges, what may be expected of the layman

[22] Mr. Justice Brandeis (*Yale University Press, 1932*), p. 111.

—the editor—the orator—the public—wishing to exercise the p .vilege of free discussion of matters of public consequence?

Of the "reasonable tendency" test, Mr. Justice Gibson in his dissent stated:

> "This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press.
>
> * * *
>
> " * * * the test permits the placing of restraints on speech and press as varied as the sensitivities of a particular judge."
>
> (R. 143.)

Proscription of Comment Until the Point of Finality Announced by the State Court Has Been Reached Amounts to Judicial Censorship.

Not only is the "reasonable tendency" test vague, elastic and varied, but until such point of finality has been reached that the case no longer will be newsworthy, comments on causes, in which verdicts of guilty have been returned, are prohibited. The California Supreme Court has held that so long as the case is pending such comment "comes within those prohibited acts, the commission of which renders those responsible therefor liable to the punitive powers of the court" (R. 130).

As we have stated, the perid of prohibition is indefinite. It certainly may extend for at least five weeks, as is shown in the criminal action referred to in the third editorial, "PROBATION FOR GORILLAS?" (R. 23). The extent of the period of prohibition may be de-

termined by the trial judge in his discretion from considerations of convenience of court or counsel, or for other reasons peculiar to the particular case and having no logical relation to public interest. It is not necessary that a motion for new trial or application for probation be actually pending, for the period of prohibition continues as long as the defendants have the right to pursue such remedies (R. 125). The California Supreme Court declares: "It cannot be successfully contended that the verdict was decisive of the case or *was a final determination of the fate of the defendants*" (R. 125). The language of the majority opinion just quoted is inconsistent with the letter and the spirit of the Federal Constitution, and if enforced would destroy privileges guaranteed by the Bill of Rights and would lead to absurd results.

If two men are convicted of murder, *"a final determination of the fate of the defendants"* would date from the time of their execution. Employing the language of the majority opinion, until the time of their execution it cannot be successfully contended that the verdict was decisive of the case or was a final determination of the fate of the defendants." If one charged with murder pleads guilty and is sentenced to death, prior to his execution newspapers may not comment upon the enormity of the crime or the depravity of the defendant, for the reason that a writ of error *coram nobis* is still available. Such writ, with its accompanying delay, is occasionally, and recently has been, successfully resorted to in California.[23]

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[23] *People v. Campos*, 3 Cal. (2d) 15.

The "Clear and Present Danger" Test Is Objective; the "Reasonable Tendency" Test Subjective.

The "clear and present danger" test is not the same as the "reasonable tendency" test, as respondent asserts (Br. Opp. Cert. 42-44). The former is objective; the latter subjective. The "clear and present danger" test submits to the trier of the proceeding the task of passing upon facts, viz., the circumstances under which the utterance is made, its tenor, the temper of the times, the past conduct of the speaker relative to matters of similar import, and whether the utterance ever came to the attention of the court. Such matters men are qualified to appraise rationally. But a presumed "tendency" cannot be accurately or objectively evaluated. The "tendency" of an utterance is good or bad, as it conforms with or differs from the subjective opinion or sensibilities of the civil magistrate.[24]

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[24] *Reynolds v. United States*, 98 U. S. 145, 163; Jefferson's Preamble to Virginia Act for Establishing Religious Freedom, quoted in *Chafee—Freedom of Speech*, p. 31.

POINT 2.

The erroneous conclusion of the State Court that the editorials had a "reasonable tendency" to interfere with the orderly administration of justice has sacrificed a freedom that "is the matrix, the indispensable condition, of nearly every other form of freedom" "for a need which is fancied rather than real."

If this court concludes that the "reasonable tendency" test of the California Supreme Court is sufficiently definite and affords a proper latitude to the expression of opinion, we then submit for consideration that the editorials had no "reasonable tendency" to interfere with the orderly administration of justice. The contrary conclusion of the California Supreme Court results from an improper application of the test and an untenable construction of the language of the editorials. This court will inquire whether such application and construction have deprived petitioners of the right of freedom of speech and of the press.[25]

Concerning certain statements appearing in "SIT-STRIKERS CONVICTED," the California Supreme Court said:

> "It cannot reasonably be said that they would have no tendency to influence the trial judge * * * ." (R. 128.)

Thus, punishment is inflicted—not because the editorial had a "reasonable tendency" to interfere, but because "it cannot reasonably be said" that it "would have no tendency to influence."

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[25] *Herndon v. Lowry*, 301 U. S. 242, 247, 255.

Despite petitioners' denial of any intention to influence, the California Supreme Court declared:

> "The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of the Times. Viewing the editorial in the light of these considerations, we are satisfied that its reasonable tendency was to interfere * * * ."
> (R. 128.)

Innuendoes are ascribed to the editorial which were neither pleaded nor proved, and a construction placed upon it other than the one which the California Supreme Court concedes may have been intended by its author. This indicates persuasively the dangers to freedom of speech when its exercise is claimed to have interfered with the proper functioning of the judiciary.

The Chandler affidavit (R. 42-52) was stipulated to be true (R. 134). It sets forth at length the policy of the Times toward labor violence and the sit-down strike, and makes clear that the editorial "SIT-STRIKERS CONVICTED" was but a reiteration of the opinion of the Times on the use of violence in labor controversies, expressed on numerous occasions during the past fifty years. Though the California Supreme Court pointed out that the statements in the affidavit were true, it said that the affidavit did no more than create a conflict in the evidence which the trial court had resolved against petitioners (R. 134). The court did not point out the evidence with which the affidavit conflicted. Aside from the

affidavit there is no evidence in the record on the subject. Despite the uncontradicted facts of the affidavit, which the Supreme Court declares are true (R. 134), the trial court nevertheless considering the editorial subjectively —i. e., independent of the record—concluded otherwise. This conclusion of the trial court, the Supreme Court says created a conflict in the evidence (R. 134).

Mr. Justice Gibson states in his dissent:

> "Could there be any possible doubt in the mind of any informed resident of Los Angeles on the attitude of the Times in regard to the use of violence in labor disputes. The position maintained by the Times over many years on these matters is clearly established by the record. Its Los Angeles readers would find nothing unusual in the editorial; a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of the daily life of his community."
>
> (R. 146-147.)

We do not comprehend how this editorial (fairly construed) could have a "reasonable tendency" to influence or affect a judge possessed of "a mind of reasonable fortitude."[26]

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[26] Mr. Justice Holmes dissenting in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 425.

Realization by a Judge That His Decision Will Be Unpopular Is No Indication of Influence.

Possibly a local judge might realize (in such matters are given consideration by him) that if he extended leniency to the defendants, the Times would regard such a ruling as a mistake. Likewise he would realize, as stated by the Times in "PROBATION FOR GORILLAS?," that, if probation were granted, the Times would consider that he had made a serious mistake. Likewise, he would realize that if he did not extend leniency to the defendants, the labor groups of the community would consider that he had made a serious mistake. Doubtless his feeling in this respect would be the same irrespective of the publication of the editorials. But it cannot be the rule that merely because a judge realizes that his decision will not find favor in all quarters, he is thereby influenced. If this be the criterion, then in all cases wherein public interest is aroused, the judge will know prior to rendition of his decision that a "reasonable tendency" to influence exists. He will appreciate that his ruling will be viewed with dissatisfaction by that group entertaining contrary views. Realization of diverse public opinion is a necessary and probably desirable concomitant of our system of government. A free press, free assemblage, and free discussion contribute in large measure to the formation of public opinion.[27] In this country judges cannot be immunized against the apprehension of criticism. Judges do not ren-

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[27] *Grosjean v. American Press Co.*, 297 U. S. 233, 250.

der decisions in a legal vacuum.[28] Public interest is usually greater in contemporary than in past events; discussion should accompany the event; if discussion is delayed, the speaker's message "will be ignored,"[29] or the moment for its consideration may have passed.

No One of the Editorials Interfered or Was Calculated to Interfere With the Administration of Justice.

There is nothing in "SIT-STRIKERS CONVICTED" which constitutes a threat against any judge or a suggestion of reprisal in event of a decision contrary to the views expressed in the editorial, as is assumed by respondent (Br. Opp. Cert. 16-21). In fact, no suggestion is made in the editorial respecting any pending matter or its future disposition. It does not follow, from the circumstance that the judge might feel distressed if required to deal with defendants in a manner other than that "suggested" by the Times, that the courts "may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern."[30] This editorial, fairly interpreted in the light of existing local conditions and the well-known views of the Times upon labor disputes, did not have the "potentiality of inducing action in the interests of one rather than another

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[28] "The felt necessity of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudice which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (Holmes—The Common Law, p. 1.)

[29] Mr. Justice Gibson dissenting (R. 147).

[30] *Thornhill v. Alabama*, 310 U. S. 88, 104.

group in society."[31] If it had such potentiality, we understand the *Thornhill decision* to condone it. If a judge were so lacking in mental fortitude that this editorial would cause him to fear and submit to fear of adverse criticism by the Times, the existence of such isolated mental susceptibility will not justify abridgment of freedom of speech.

"PROBATION FOR GORILLAS?," published five weeks prior (R. 23) to the time set for hearing an application for probation of two individuals convicted by a jury of felonious assault upon non-union truck drivers (R. 51-52), vigorously opposed the granting of probation and stated that Judge Scott (the trial judge) "will make a serious mistake if he grants probation" (R. 24). The California Supreme Court characterized the editorial as

> "a striking example of a 'premature statement, argument, and intimidation' respecting the case on trial which the court condemned and held to be contumacious in the case of Patterson v. Colorado."
> (R. 131.)

Comparison of the editorial with those involved in *Patterson v. Colorado* lucidly indicates the erroneous manner in which the "reasonable tendency" test was applied in the Times case. Patterson's editorials charged the Colorado Supreme Court "and certain of its judges, with having been influenced by corrupt motives in their rulings theretofore made in pending causes, and that they would be so influenced in the final disposition of the same. Such articles further charged that such motives would operate

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[31] *Thornhill v. Alabama, supra*, 104.

on the court in its final decision of a pending cause * * * in which no action had as yet been taken by the court."[32]

There is no direct suggestion or implication reasonably to be implied from the Times editorials even remotely approaching the scandalous language appearing in the several editorials involved in the *Patterson case.*

"PROBATION FOR GORILLAS?," like "SIT-STRIKERS CONVICTED," was but the expression of the well-known policy of the Times regarding violence in labor disputes. From the Chandler affidavit it appears that it is established practice to invite opinion in probation matters; that probation officers send out requests for such opinions (R. 52); and that sometime prior thereto, but *following* the granting of an application for probation, the Times had published an article criticising the granting of probation, whereupon the presiding judge of the Superior Court of Los Angeles County advised the Times that its objection should have been made known while the application for probation was pending, rather than subsequent to action taken thereon (R. 52). In the Yoakum affidavit it is pointed out that opinions concerning the propriety of granting probation are attached by the probation officer to his report which he sends to the judge, that the probation officer does likewise with reference to voluntary letters which he receives (R. 53-54), and that in one instance the District Attorney's office wrote a judge respecting the penalty to be imposed on an applicant for probation (R. 54). The California Supreme Court stated that these circumstances had no bear-

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[32] *People v. News-Times Publishing Co.*, 35 Colo. 253, 391.

ing upon the legality of the editorial, declaring that if the Times could publicly comment, some other newspaper could likewise comment, suggesting leniency, and that there would then exist

> "the deplorable situation of a heated newspaper controversy being carried on in the community while the question of probation was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend."
>
> (R. 132.)

Whether the existence of such a situation would "contribute to the orderly administration of justice" we believe is open to sincere difference of opinion; but regardless, the suggestion is clearly beside the point. Petitioners were not convicted of failure to contribute to, but for interfering with, the orderly administration of justice. "• • • a State may not unduly suppress free communication of views • • • under the guise of conserving desirable conditions."[33]

The California Supreme Court pointed out that it was proper to communicate with the judge respecting the propriety, or lack thereof, of probation, provided, however, that this were done through the medium of the probation officer (R. 132-133). If the press or an individual should desire to influence a judge, this could be accomplished much more readily by a clandestine approach to the judge through a probation officer than by a frank editorial in public print. An editorial is intended primarily, if not entirely, to advance the opinion of the

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[33] *Cantwell v. Connecticut*, 310 U. S. 296, 308.

editor to his reading public, and to impress upon the public the importance of the matter under discussion.

Finally, although no mention of this appears in the opinion of the California Supreme Court, it should be noted that persons convicted of an assault with a deadly weapon were not, under California law, entitled to probation.[34]

The editorial was further condemned for the reasons stated by the court in its discussion of "SIT-STRIKERS CONVICTED" (R. 133).

Respondent's analysis of "PROBATION FOR GORILLAS?" (Br. Opp. Cert. 21-26) is founded on the unsupported theory that the Times regarded the sentences imposed upon the sit-strikers as light and that it was determined that in the future sentences imposed upon persons convicted in labor disputes should be severe. Neither the record nor the facts support this assertion.

The excerpt quoted by respondent from the *Cantwell decision* (Br. Opp. Cert. 22) has been taken from its context and urged as authority for condemning the reference in "PROBATION FOR GORILLAS?" to the defendants as "gorillas" and "sluggers for pay." The *Cantwell decision* makes clear that resort to epithets or personal abuse directed to the person of the hearer "is not in any proper sense communication of information or opinion safeguarded by the constitution" (310 U. S. 310). The editorial was not directed to the convicted defendants, but

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[34] *Cal. Penal Code*, Sec. 1203: ". . . probation shall not be granted . . . . to a defendant who used or attempted to use a deadly weapon in connection with the perpetration of the crime of which he was convicted . . ."; *In re Sheffield*, 18 Cal. App. (2d) 177, 178.

to the public. It was the expression of the opinion of the Times upon an industrial and social matter of consequence. Its characterization of defendants convicted of assault with a deadly weapon in connection with a labor dispute as "gorillas" or as "sluggers for pay" constituted the publisher's conclusion arrived at upon the facts stated. The conclusion, whether correct or not, would be accepted or not by the readers' attitude or opinion. It did not constitute vilification. If it did, the *Cantwell decision* recognizes that in the discussion of matters of public concern the pleader at times "resorts to exaggeration, to vilification * * *, and even to false statement" (310 U. S. 310), but that in the long view it is better that these excesses be tolerated than that freedom of speech be curtailed.

Concerning "THE FALL OF AN EX-QUEEN" (R. 17), the California Supreme Court said:

> "While the editorial does not refer to the case which was then pending * * * it is hardly conceivable that those in charge of its publication were ignorant of the pendency of said action."
>
> (R. 130.)

This editorial, said the California Supreme Court:

> "would have a disturbing effect upon the judge before whom the case was pending when the time came for pronouncing judgment."
>
> (R. 130.)

The court concluded that the editorial fell within the category of the acts prohibited by authorities previously cited in its opinion (R. 130), namely, *Patterson v. Colorado*, 205 U. S. 454, and *Sinclair v. United States*, 279 U. S. 749 (which was not a free-speech case).

Counsel for respondent quote an excerpt from a statement attributed to an unnamed local trial judge respecting an item he had read in the public press concerning the Werner case. Counsel urge that the state courts would judicially notice this excerpt (Br. Opp. Cert. 15). The doctrine of judicial notice will bear no such interpretation.[35] Again it is a complete answer to point out that the excerpt is not a part of the record; the judge to whom the statement is ascribed was not referring to the editorial "THE FALL OF AN EX-QUEEN," but to published statements of the defendants; the accusation upon which the contempt proceedings were instituted and prosecuted charged that the editorial had an inherent tendency to influence; it did not charge and there was no proof of an actual interference or of knowledge of the editorial by the judge presiding at subsequent proceedings in the Werner case. The California courts adopted the theory of "reasonable tendency" and made no mention of this excerpt not of record. On the contrary, the California Supreme Court conceded that the editorial contained no reference to any pending or contemplated proceeding (R. 130).

In Practical Effect the Judgment Below Forbids the Exercise of Freedom of the Press Respecting Judicial Proceedings.

If these rulings are permitted to stand, no public comment may be made on problems of social, economic or moral consequence involved in court proceedings, even though the proceedings have passed the stage of finality

[35] *Estate of Fulton*, 8 Cal. App. (2d) 423, 425.

following the entry of verdict of a jury or the judgment of a court. The voices of the soap-box orator and radio commentator are stilled, the newspaper presses are stopped,[36] until some indefinite future time—and this irrespective of any clear showing that serious interference with the administration of justice might result.

CONCLUSION.

> "The most dearly prized offspring of our national liberty, is the freedom of the press."
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> *Ex parte Hickey,* 4 Smedes & M. (Miss.), 751, 781.

Not all of the appellate tribunals of the State of California are unmindful of the importance or unaware of the trend of thought and decision respecting the great constitutional right here under consideration. Concerning this right the District Court of Appeal for the Fourth Appellate District lately (June 1938) declared:

> "As we have seen, a secondary boycott peacefully and properly conducted is legal in California under the constitutional guaranty of the right of free speech. It is now too late for us to question such right. In a

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[36] "No difference can be discerned between the rights of the citizen and the proper limitation thereof under his aforesaid constitutional guaranty, whether that citizen be a minister speaking from his pulpit, or a broadcaster through the radio, or an editor through his newspaper, or a curbstone orator from his soap box, or an anarchist from whatever forum he may find for the exploitation of his doctrines . . .

"'. . . what may be spoken may be written, and the converse of the proposition is true that what may not be spoken under such circumstances may not be written.'" (*In re Shuler*, 210 Cal. 377, 402-403.)

> Republic it is necessary that the rights of freedom of speech and freedom of the press be zealously guarded by the courts. Those rights form the life stream of liberty. History teaches us that when those rights are suspended, the right to possess and enjoy private property rapidly vanishes."
>
> *In re Lyons*, 27 Cal. App. (2d) 293, 306.

Recently (April 1940) Mr. Justice White, of the District Court of Appeal, dissenting in *Ex parte Fortenbury*, 101 Pac. (2d) 105 (not officially reported), warned:

> "Let us not alone boast of the priceless heritage that is ours in the constitutional guaranties and liberties we enjoy, but let us as well uphold and defend them. * * * let us remember the salutary words of Thomas Jefferson in his first inaugural address, when he said, ' . . . freedom of religion, freedom of the press, and freedom of person, under the protection of the habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our step through an age of revolution and reformation. * * * should we wander from them in moments of error or of alarm, let us hasten to retrace our step to regain the road which alone leads to peace, liberty and safety.'"
>
> 101 Pac. (2d) 115.

The highest courts of other states have likewise emphatically stated the importance of and necessity for preservation of freedom of the press:

> "The battles for a free Press are a part of the march of democracy. From complete strangulation by an autocratic monarchy in England in the seven-

teenth century the Press has risen through heroic efforts to occupy a distinguished and necessary place in our form of government. Increased freedom and privileges were secured during the eighteenth and nineteenth centuries from legislatures and courts. As the people became enfranchised, the Press has been made free. In return it has been the duty of the Press to protect the public by bringing the activities and officials of government to the bar of public opinion through the publication of accurate facts and enlightened comment."

State v. American News Co., 64 S. D. 385, ——.

"Any citizen has the right to publish the proceedings and decisions of this court, and if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important public trusts reposed in them, but he has no right to attempt, by defamatory publications, to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard and set at naught its orders, judgments, and decrees."

State v. Morrill, 16 Ark. 384, 403.

Mr. Justice Sutherland, in announcing the unanimous opinion of this court in *Grosjean v. American Press Co.*, 297 U. S. 233, 250, declared:

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of

the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. * * * A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In *Near v. Minnesota,* 283 U. S. 697, this court, quoting James Madison, said:

"'* * * to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; * * *.'"

283 U. S. 718.

During the October Term, 1939, this court on several occasions declared in unmistakably clear language the need for preservation of freedom of speech and of the press:

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."

Schneider v. New Jersey, 308 U. S. 147, 161.

"The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty

of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. * * * A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

Thornhill v. Alabama, 310 U. S. 88, 97.

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

Id. 101-102.

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been,

or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

Cantwell v. Connecticut, 310 U. S. 296, 310.

This court, in the final opinion delivered by Mr. Justice Cardozo, spoke as follows:

"We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra, p. 99. This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."

Palko v. Connecticut, 302 U. S. 319, 326-327.

Without the United States there is not today in all the world an exact counterpart of our constitutional guarantee of freedom of speech and of the press. It may be correct to say that the pages of history do not recount an era when the effect of suppression and denial of these rights and liberties has been so manifest. In the United States of America we have not reached a point from which we shall retrace our steps. The judgment of conviction below is a command to halt and look and proceed backward. The opinion of the Supreme Court of California stands alone. In the literature of American decisions there may be found no decision of an appellate tribunal to sustain the judgment below.

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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APPENDIX.

Resume of Contempt of Court Decisions Cited by the California Supreme Court in its Opinion in the Bridges or the Times Case.

Bee Publishing Co. v. State, 107 Neb. 74.

Prior to the trial of a criminal proceeding, the newspaper published an article commenting unfavorably on the integrity of witnesses who had appeared before the grand jury and who of necessity would be witnesses at the trial. The article indulged in violent comment and declared the innocence of the accused. Its conviction for contempt of court was affirmed.

Cheadle v. State, 110 Ind. 301.

After a mistrial in a criminal action due to tardiness of the defendant in attending a court session, a newspaper editor published a facetious account of the court proceedings leading up to the mistrial and stating that the trial judge had lost his temper "badly" and had reprimanded the attorneys for the defendant. Subsequently the editor published an article sharply criticising the trial judge for delaying action on the defendant's application for a writ of habeas corpus (the tardy defendant having been imprisoned when apprehended). The conviction for contempt of court was reversed.

Herald-Republican Publishing Co. v. Lewis, 42 Utah 188.

The day following commencement of a murder trial, a newspaper published a resume of the court proceedings

of the opening day of trial, and published a copy of a purported confession of one of the defendants, which purported confession had not been introduced in evidence. The court stated that a publication which "merely tends or is calculated to do so [interfere with judicial proceedings] is not enough" to constitute a contempt—"it must naturally and necessarily have such effect" (42 Utah 202). The contempt of court conviction was reversed.

In re Independent Publishing Co., 240 Fed. 849 (C.C.A. 9).

During the course of a mail fraud prosecution, the only morning newspaper published at the place of trial printed an article stating that the defendant had previously been convicted of embezzlement and was out on parole. The article was read by members of the jury and the court declared a mistrial. The newspaper *did not deny* that the article constituted an interference with the due administration of justice. The conviction for contempt of court was affirmed.

In re Lindsley, 75 Cal. App. 122.

Lindsley was the defendant in a criminal libel action which had been set for trial and the jury panel had already been selected. Thereafter he published in four issues of his newspaper (which circulated at the place of trial and had many subscribers in the county wherein the trial would be held) statements attacking the county District Attorney, impugning his motives respecting his prosecution of the criminal action, and reflecting upon the character and veracity of the prosecuting witness.

Among other things he stated, concerning the prosecuting witness, that he was "a former admitted stool pigeon, and the man who made a perjured expense bill against the county, later stolen from the supervisors' file" (75 Cal. App. 124). The editor was convicted of contempt of court and the appellate court refused to issue habeas corpus.

Nixon v. State, 207 Ind. 426.

A newspaper article severely criticised a trial judge for the appointment of a particular person as receiver. The criticism appeared subsequent to the time of the appointment, but during the pendency of the receivership proceeding. The conviction for contempt of court was reversed.

Patterson v. Colorado, 205 U. S. 454.

Resume appears in brief, ante p. 28.

People v. Wilson, 64 Ill. 195.

During the pendency of an appeal to the Supreme Court in Illinois of a person convicted of murder, a newspaper published an article stating that money raised for the appeal was "operating splendidly"; prophesying that the conviction would be reversed and asserting that $1,400.00 "is enough nowadays to enable a man to purchase immunity from the consequences of any crime," and that "the courts are now completely in control of corrupt and mercenary shysters—the jackals of the legal profession." The Supreme Court of Illinois issued a contempt citation to the editor of the paper and by a four-to-three decision held him in contempt of court.

In re San Francisco Chronicle, 1 Cal. (2d) 630.

The Supreme Court of California issued a contempt citation and prosecuted and convicted the editor of a newspaper of contempt of court for publishing an article purporting to disclose the judgment of the Supreme Court reversing a judgment of conviction below in a capital case which was then pending before it and as to which no judgment or opinion had been made public. The effect of the article would lead the readers of the newspaper to believe that the paper had a secret means of obtaining, in advance of their publication, decisions of the California Supreme Court.

In re Shortridge, 99 Cal. 526.

Shortridge was convicted of contempt of court for publishing an article containing excerpts from evidence "of a filthy nature" adduced during a divorce trial. The Supreme Court of California annulled his conviction, stating that there was no "real danger" (99 Cal. 534) that the publication of the evidence would deter timid or sensitive witnesses from testifying to the truth.

In re Shuler, 210 Cal. 377.

Reverend Shuler was convicted of contempt of court for uttering a series of radio addresses assailing the motives and impugning the integrity of the judges of the Superior Court of Los Angeles County with respect to certain cases then pending before them. The California Supreme Court denied his petition for habeas corpus.

Sinclair v. United States, 279 U. S. 749.

The defendant in a pending criminal trial caused the jurors, their families and friends to be shadowed and investigated. This circumstance contributed to an entry of a mistrial in the criminal proceeding. The conviction for contempt of court was affirmed by this court.

State v. Circuit Court, 97 Wis. 1.

During a judicial election campaign, violent strictures assailing the integrity of the incumbent judge (also a candidate for reelection) were written and published by a rival candidate and an opposition newspaper. The incumbent judge sought to punish for contempt and the Supreme Court issued an alternative writ of prohibition which thereafter was made absolute, the court holding that such comment did not constitute a contempt of court.

State v. Howell, 80 Conn. 668.

Shortly prior to and during the course of a jury trial, a community newspaper published articles summing up the evidence which would be introduced, commenting thereon, and reflecting upon the parties and expressing an opinion on the merits. Its conviction for contempt of court was affirmed.

State v. Lovell, 117 Neb. 710.

During the pendency of a civil appeal before the Supreme Court of Nebraska, defendant published a newspaper article wherein he prophesied that the case would be affirmed; he mentioned gossip to the effect that there was a certain person who believed that interests friendly

to the appellants were in a position to influence the judges of the Supreme Court and that the unnamed person offered to bet that the judgment would be reversed. The article defended the integrity of the judges but suggested that the confidence of the public in the judiciary would be enhanced if the decision were rendered prior to the coming general election. The Supreme Court cited the editor and held him guilty of contempt of court and imposed a jail sentence.

State v. New Mexican Printing Co., 25 New Mex. 102.

During the pendency of civil and criminal libel actions against the New Mexican Printing Co., it published an article stating that the suits were political in their nature and that the trial judge was a strong supporter of the political boss in control of the county wherein the causes were pending. The conviction of contempt of court was reversed.

State v. Tugwell, 19 Wash. 238.

Shortly after the rendition of a decision by the Supreme Court of Washington (but prior to expiration of the time within which a petition for rehearing might have been acted upon), an editor published comment bitterly criticising the decision and vigorously impugning the integrity of at least one of the members of the court. The Supreme Court of Washington held that the publication was a contempt of court.

Matter of Sturoc, 48 N. H. 428.

Sturoc, a lawyer, caused to be published in a newspaper circulated in a small town where a criminal prosecution was pending, while the court was in session and during the term in which it would likely try the proceeding, an article severely criticising the prosecution and using abusive terms. The conviction for contempt of court was affirmed.

Tate v. State, 132 Tenn. 131.

During the course of a jury trial in a will contest, the editor of a newspaper caused to be published an article referring to "mysterious affidavits" offered in evidence, but rejected by the trial court, in the absence of the jury. The conviction of the editor for contempt of court was affirmed.

Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294.

Pending a jury trial in an action to recover damages for taking of property by a public body, a newspaper published that the public body had offered the plaintiff $80.00 damages at the time it took his property, but that plaintiff demanded $250.00, and, not getting it, "went to law." The conviction of the newspaper for contempt of court was affirmed.

Toledo Newspaper Co. v. United States, 247 U. S. 402.

Resume appears in brief, ante, p. 14.